The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	CS/SB 2598
INTRODUCER:	Health Regulation Committee and Senator Atwater
SUBJECT:	Treatment Program for Impaired Medical Practitioners
DATE:	March 26, 2008 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe/Stovall	Wilson	HR	**Fav/CS**
2.			HA	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill expands the list of persons who may be retained by the Department of Health (DOH or department) to work as a consultant for the impaired practitioners' treatment program to include an entity employing a medical director who must be a practitioner or recovered practitioner who holds a Florida license as a medical physician, osteopathic physician, physician assistant, anesthesiology assistant, or nurse.

The bill authorizes the DOH to contract with impaired practitioner program consultants to provide services to students enrolled in accredited medical, osteopathic, or nursing schools, if the school requests such services. The bill provides immunity from civil liability to the medical and osteopathic schools for the referral of a student to a consultant or for disciplinary actions that adversely affect the status of the student.

The bill designates an impaired practitioner consultant, a consultant's officers or employees, and persons acting at the direction of the consultant for emergency intervention, when the consultant is unable to perform the intervention, agents of the DOH or other state agency for purposes of sovereign immunity and the waiver of sovereign immunity for actions taken within the scope of the contract with the DOH or other state agency. The bill specifies requirements for the contract.

The bill also requires the Department of Financial Services (DFS) to defend any claim, suit, action, or proceeding against the consultant for acts or omissions arising out of the consultant's duties under the contract.

This bill amends section 456.076, Florida Statutes.

II. Present Situation:

Impaired Practitioners' Treatment Programs

Health care practitioners are regulated under various practice acts and the general regulatory provisions of ch. 456, F.S. Under s. 456.072(1)(z), F.S., disciplinary action may be taken against a licensed health care professional who is unable to practice with reasonable skill and safety due to illness, or use of alcohol, drugs, narcotics, chemicals or any other type of material, or as the result of any mental or physical condition. The impaired practitioners' treatment program was created to help treat practitioners who are impaired due to alcohol or substance abuse. By entering and successfully completing the program, a practitioner may avoid formal disciplinary action by his or her board, if his or her only violation of the practice regulations is the impairment. Disciplinary action will not be taken if the practitioner acknowledges his or her impairment, voluntarily enrolls in an approved treatment program, and voluntarily withdraws from his or her practice or limits the scope of his or her practice as determined by the probable cause panel of the appropriate board until such time as the panel is satisfied that the practitioner has successfully completed the treatment program. To avoid discipline, the practitioner must also execute releases for medical records authorizing the release of all records of evaluation, diagnosis, and treatment to the impaired practitioners' treatment program consultant. The impaired practitioners' treatment program is only available to health care practitioners regulated by the DOH.

Section 456.076, F.S., requires the DOH to retain one or more impaired practitioner consultants to assist the department in determining whether a practitioner is impaired and to monitor the treatment of the impaired practitioner. The consultant must be a practitioner or recovered practitioner who is a Florida-licensed medical physician, osteopathic physician, physician assistant, anesthesiology assistant, or nurse. Consultants must refer impaired practitioners to department-approved treatment programs and providers.[1] Although consultants do not provide medical treatment, they are required to make recommendations to the DOH regarding a practitioner's ability to practice.

The DOH currently contracts with the Intervention Project for Nurses (IPN) for licensed nurses and the Professional Resource Network (PRN) for all other licensed professions. The contract with the IPN for fiscal year 2007-2008 is for $1,331,699 and the contract with the PRN for fiscal year 2007-08 is for $1,557,262. According to the DOH, there are approximately 2,700 participants enrolled in the programs: 1,600 in the IPN and 1,100 in the PRN. As of December 2007, there were 4 medical students receiving services provided by the PRN and 14 nursing students receiving services provided by the IPN.[2]

[1] See s. 456.076, F.S.

[2] *Impaired Practitioners Program of Florida: Professional Resource Network, Inc.* and *Intervention Project for Nurses* Monthly Reports prepared for the DOH (December 2007).

The contract with the PRN provides that, in the unlikely event that a medical student needs assistance, then the contract provider is authorized to offer services on a limited basis. According to the DOH, the contract's coverage of medical students is limited to medical or osteopathic physician residents or fellows who are registered with the DOH. The PRN has a separate contract with state medical schools and uses limited funding from sources other than that provided through the DOH contract. The contract with the IPN does not contain language regarding students. If an intern for any profession regulated by the DOH is registered with the department, the DOH and the contract vendor interpret the contract to cover them.

The contracts with the PRN and the IPN both require the contract provider to be liable for and indemnify, defend, and hold harmless the department and all of its officers, agents, and employees from all claims, suits, judgments, or damages, consequential or otherwise and including attorneys' fees and costs, arising out of any act, actions, neglect, or omissions by the provider, its agents, or employees during the performance or operation of the contract, whether direct or indirect, and whether to any person or tangible or intangible property. Each contractor is also required to provide adequate liability insurance coverage on a comprehensive basis and to hold such liability insurance at all times during the existence of the contract and any renewals and extensions, thereof. According to the DOH, over the last 10 years six civil suits were filed and in only two of the suits was the Secretary of Health or a board listed as a defendant (an employment discrimination suit and a civil rights case).

Sovereign Immunity

Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions, but imposes a $100,000 limit on the government's liability to a single person and for claims arising out of a single incident, the limit is $200,000. Section 768.28, F.S., outlines requirements for claimants alleging an injury by the state or its agencies. Section 11.066, F.S., requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to enforce a judgment against the state or state agency. The exclusive remedy to enforce damage awards that exceed the recovery cap is by an act of the Legislature through the claims bill process. A claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

Section 768.28(9), F.S., defines "officer, employee, or agent" to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S. (Access to Health Care Act), any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the DOH, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.

Sovereign immunity is potentially available to private entities under contract with the government as set forth in s. 768.28(9), F.S., which states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent's torts. The factors required to establish an agency relationship are: acknowledgment by the principal that the agent will act for him; the agent's acceptance of the undertaking; and control by the principal over the actions of the agent.[3] The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible of only one interpretation the court may decide the issue as a matter of law.[4]

State Risk Management Program

Part II of ch. 284, F.S., governs state casualty claims. Under s. 284.385, F.S., all departments that are covered by the State Risk Management Trust Fund must immediately report all known or potential claims to the DFS for handling. All departments are required to cooperate with the DFS and no claim may be compromised or settled for monetary compensation without the prior approval of the DFS and prior notification to the covered department. The payment of a settlement or judgment for any claim covered or reported under part II of ch. 284, F.S., must be made only from the State Risk Management Trust Fund. It is the duty of the Division of Risk Management of the DFS to administer part II of ch. 284, F.S.

Fee-based Regulation of Health Professions in DOH

Section 456.025(8), F.S., provides that the regulation by the department of professions, as defined in this chapter, shall be financed solely from revenue collected by it from fees and other charges and deposited in the Medical Quality Assurance Trust Fund, and all such revenue is hereby appropriated to the department. However, it is legislative intent that each profession shall operate within its anticipated fees. The DOH may not expend funds from the account of a profession to pay for the expenses incurred on behalf of another profession, except that the Board of Nursing must pay for any costs incurred in the regulation of certified nursing assistants. The DOH must maintain adequate records to support its allocation of agency expenses.

III. Effect of Proposed Changes:

The bill amends s. 456.076, F.S., to expand the list of persons who may be retained by the DOH to work as a consultant for the impaired practitioners' treatment program to include an entity employing a medical director who must be a practitioner or recovered practitioner who holds a Florida license as a medical physician, osteopathic physician, physician assistant, anesthesiology assistant, or nurse.

The bill authorizes the DOH to contract with the consultant of the impaired practitioners' treatment program, for appropriate compensation, for services to be provided, if requested by the school, for students enrolled in medical schools, osteopathic medical school, or nursing schools, who are alleged to be impaired due to the misuse or abuse of alcohol or drugs, or both, or due to a mental or physical condition.

[3] *Goldschmidt v. Holman,* 571 So.2d 422 (Fla. 1990).
[4] *Campbell v. Osmond,* 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel,* 694 So.2d 701 (Fla. 1997).

Accredited medical schools or osteopathic medical schools that are required to give notice and provide due process procedures to students, are not liable in any civil action for:

- Referring a student to the consultant retained by the DOH, or
- Disciplinary actions that adversely affect the status of a student when the disciplinary actions are instituted in reasonable reliance on the recommendations, reports, or conclusions given by a consultant.

For the immunity from civil liability to attach to accredited medical schools, the schools must adhere to the due process procedures adopted by the applicable accreditation entities and no intentional fraud can be involved.

The bill makes the consultant of the impaired practitioners' treatment program, a consultant's officers and employees, and those acting at the direction of the consultant for the limited purpose of an emergency intervention on behalf of a licensee or student when the consultant is unable to perform intervention, an agent of the DOH for purposes of s. 768.28, F.S. Such agent must be acting within the scope of the consultant's duties under the contract with the DOH if the contract complies with the following:

- Requires the consultant to establish a quality assurance program to monitor services delivered under the contract;
- Requires the consultant's quality assurance program, treatment, and monitoring records to be evaluated quarterly;
- Requires the consultant's quality assurance program to be subject to review and approval by the DOH;
- Requires the consultant to operate under policies and procedures approved by the DOH;
- Requires the consultant to provide the DOH, for its approval, a policy and procedure manual that comports with all statutes, rules, and contract provisions;
- Requires the DOH to be entitled to review the records relating to the consultant's performance under the contract for purposes of management and financial audits or program evaluation;
- Requires all performance measures and standards to be subject to verification and approval by the DOH; and
- Allows the DOH to terminate the contract with the consultant for noncompliance.

The bill requires the DFS to defend the consultant, its officers or employees, and any person acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention, from any legal action brought as a result of contracted program activities. The bill designates the consultant an agent of the state if the consultant is retained by any other state agency under specified conditions.

The effective date of the bill is July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The barring of civil recovery against schools under specified circumstances and the extension of sovereign immunity and the waiver of sovereign immunity to specified persons under the bill raise questions about possible infringements on the right of access to the courts. Section 21, Article I of the State Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigants' right to file certain actions it would have to meet the test announced by the Florida Supreme Court in Kluger v. White[5]. Under the constitutional test established by the Florida Supreme Court in *Kluger v. White*, the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

The DOH suggests that the bill may conflict with Article IX of the Florida Constitution that requires governance of schools, colleges, and universities, and their students, to belong to local school boards, the State Board of Education, Boards of Trustees, and the Statewide Board of Governors. The bill may allow impermissible infringement upon student regulation and conduct by the DOH, an executive department under the Governor, contrary to Article IX and its implementing legislation.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[5] See *Kluger v. White,* 281 So.2d 1 (Fla. 1973).

B. Private Sector Impact:

Medical, osteopathic, and nursing students deemed impaired may be offered assistance through the impaired practitioners' treatment program. The student must bear the costs of any required treatment or evaluations.

Impaired practitioner consultants would no longer have to bear the costs of defense against claims.

C. Government Sector Impact:

Impaired practitioner consultants are currently considered vendors or consultants of the DOH and are responsible for paying for all costs associated with defending any claim, suit, or proceeding. Under the bill, if impaired practitioner consultants are deemed agents of the DOH, the DFS would be responsible for defending any claims against the consultants. The potential fiscal impact is indeterminate. The DOH staff has stated that the Medical Quality Assurance Trust Fund will have to reimburse the DFS for any costs associated with defending a claim against an impaired practitioner consultant.

The DFS indicated that, based on past historical experience with similar legislation that expanded coverage to private health care providers by designating them as agents of the state, the cost impact to the state (the DOH and the Risk Management Trust Fund) should be minimal (less than $100,000 annually), but the projected cost is unknown to any degree of certainty without more data reflecting the number of medical students, the number of consultants covered, and past claims.

The current DOH contract with the PRN costs $1,439 per physician. The addition of medical students (estimated 27 participants per year) will increase the costs for the contract with the PRN by $38,855. At the time of publication, a fiscal impact related to costs for nursing students is not known.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides immunity from civil liability to the medical and osteopathic schools for the referral of a student to a consultant or for disciplinary actions that adversely affect the status of the student. The amendment enabling students in nursing schools to participate in the impaired practitioner treatment programs did not provide a comparable immunity from civil liability.

It is unclear whether the costs of the consultants for impaired students should be the responsibility of an educational institution or licensed health care professionals. If the costs are borne by licensed professionals under the DOH, it may require an amendment to s. 456,025(8), F.S., which provides, in part, that the regulation by the department of professions, as defined in this chapter, shall be financed solely from revenue collected by it from fees and other charges and deposited in the Medical Quality Assurance Trust Fund, and all such revenue is hereby

appropriated to the department. However, it is legislative intent that each profession shall operate within its anticipated fees. The DOH may not expend funds from the account of a profession to pay for the expenses incurred on behalf of another profession, except that the Board of Nursing must pay for any costs incurred in the regulation of certified nursing assistants. The DOH must maintain adequate records to support its allocation of agency expenses.

The DOH notes that neither the department nor the boards have statutory authority to regulate or discipline physician students or operate an impaired student program. The department indicates that it is contrary to existing legislative intent to regulate health professions for the benefit of physician students who may never graduate, may leave the state, or may never obtain a Florida license.

The DOH also notes that there is no nexus or requisite degree of control that justifies as a legal matter extending sovereign immunity protection to an independent contractor consultant. Moreover, the bill would extend sovereign immunity not only to the independent contractor consultant, but also to its officers and agents.

The DOH recommends that the bill require the consultants to indemnify the state up to the limits under s. 768.28, F.S. This would ensure that the consultant is not being treated any differently than any other vendor or contract agent of the state who is afforded the privilege of sovereign immunity.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation on March 26, 2008:
Adds nursing students to persons who may be treated by contract consultants under the impaired practitioners program.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.